Message 201

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Notification: 2023/0632/FR

Forwarding of the response of the Member State notifying a draft (France) to request for supplementary information (INFOSUP) of European Commission.

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5.

6. As part of the notification procedure provided for in Directive (EU) 2015/1535, on 8 November 2023, the French authorities notified to the Commission Articles 2b, 3a A, 5a B, 5d, 15, 15a, 16 and 36 of the 'Draft Act aimed at securing and regulating the digital space' adopted at first reading by the National Assembly' (the 'notified draft') in its version adopted by the French National Assembly on 17 October 2023. In order to allow the Commission services to complete their analysis under the relevant provisions of EU law, the French authorities are kindly invited to reply to the following request for supplementary information:

1. The Commission services note that the French authorities have only formally notified certain Articles of the notified draft. The Commission services would like to know whether the draft notified in its version of 17 October 2023 consists of other provisions which are not part of the notified draft. If so, the Commission services would like to ask why these provisions were not notified in accordance with the procedure laid down in Directive (EU) 2015/1535.

A first notification under Directive 2015/1535 was made on 7 June 2023, notifying all Articles 1 to 10, 17 and 36.

A second notification was made on 24 July 2023 following consideration of the draft Act in the Senate. Several provisions were added by members of parliament, necessitating a new notification under Directive 2015/1535, including Articles 1

to 7, 9 to 10a, 17, 22, 28, 29 and 36. Of the articles initially notified, only those containing new measures in relation to the version notified in June were renotified.

A third notification was made on 8 November 2023 following consideration of the draft Act in the National Assembly. Several provisions were added by members of parliament, necessitating a new notification under Directive 2015/1535: Articles 2b, 3a A, 5a B, 5d, 15, 15a, 16 and 36. Of the articles previously notified, only those containing new measures in relation to the version notified in July were renotified.

The French authorities therefore consider that all the provisions that had to be notified under Directive 2015/1535 have actually been notified.

2. The Commission services ask the French authorities to provide them with the latest consolidated version of the full text of the 'Draft Act aimed at securing and regulating the digital space' adopted at first reading by the National Assembly. This would be necessary to enable the assessment of compatibility of the notified provisions with EU law, in view of the several notifications received of this draft Act and the on-going modifications in the national legislative process.

The draft Act, in its consolidated version issued by the National Assembly in October 2023, is being sent with this letter.

3. The French authorities are kindly invited to clarify whether the provisions in the notified draft are intended to apply to providers of information society services established in Member States other than France. If so, the Commission services would like to receive further information regarding:
(i) the exact obligations that would apply to those providers;
(ii) whether the French authorities have identified those providers or what would be the basis for identifying them;
and (iii) how the French authorities intend to comply with the requirements set out in Article 3(4) of Directive 2000/31/EC (in particular in the light of the CJEU judgment in Case C-376/22).

The notified provisions are intended to apply respectively to each category of information society service providers as defined in each article, regardless of whether the provider is established in France or not. For those of the measures set out below which fall within the scope of Directive 2000/31, the French authorities intend, in principle, to restrict their application only to services established in France or outside the European Union; as regards services established in other Member States of the European Union, the Act would allow, by way of derogation from the country of origin principle, their subsequent extension to individually targeted services, in accordance with the interpretation adopted by the CJEU in its Decision C-376/22, provided that the substantive conditions laid down in Article 3 of Directive 2000/31 are satisfied and after having previously complied with the procedure laid down in that Article.

Article 2b prohibits persons exercising the activity of commercial influence from publishing pornographic content or hyperlinks to pornographic content on online platforms which do not offer the technical possibility of excluding users under the age of 18 from viewing said content.

Article 3a A defines a criminal penalty for hosting providers in case of non-compliance with a removal order within 24 hours of the posting of images or representations of a pornographic nature involving adults and disseminated without their consent. The main services concerned are social networks, as defined in Article 1 of Act No 2004-575 of 21 June 2004 on trust in the digital economy, on which these practices are most common.

Article 5a B establishes, on an experimental basis and until 31 December 2026, an agreement mechanism between user rights associations and social networks, with a view to offering users a mediation tool to mediate disputes between them over content published on those services. The experimental scheme is subject to the conclusion of an agreement between the association and the social network. Social networks that have accepted such an agreement with the associations will have to draw up, in May 2027, a public report evaluating the experiment.

Article 5d provides that social network providers must send a warning message to the holder of parental authority as

soon as they receive a report from a trusted informant concerning acts likely to fall within the scope of cyberbullying and involving a minor. The services concerned are social network services as defined in Article 1 of Act No 2004-575 of 21 June 2004 on trust in the digital economy.

Articles 15 and 15a regulate games with monetisable digital objects (JONUM), which may be offered by service providers established either in a Member State other than France or in another State party to the Agreement on the European Economic Area which has concluded with France an agreement containing an administrative assistance clause to combat tax evasion and avoidance.
The activity of these companies will be subject to prior declaration to the National Gaming Authority, the independent administrative authority responsible for regulating this new sector.
Article 15 provides that the categories of games and authorised rewards shall be defined by regulation.
Article 15a defines the obligations of JONUM companies. These are obligations relating to:
- The identification of players with the creation of a player account;
- The protection of minors: prohibiting access to gambling for minors;
- Combating problem gambling with the introduction of devices for self-exclusion from gambling and self-limiting of spending and gambling time;
- Combating fraud and money laundering: subject to the obligations laid down in Sections 2 to 7 of Chapter I and Chapter II of Title VI of Book V of the Monetary and Financial Code and in the directly applicable European provisions on combating money laundering and the financing of terrorism, including the European Regulations laying down restrictive measures adopted pursuant to Articles 75 or 215 of the Treaty on the Functioning of the European Union and by provisions adopted pursuant to Article 215 for other purposes.
- The advertising framework;
- The gambling offer's transparency with the provision of game data and events by the company to the National Gaming Authority.
The arrangements for implementing these obligations will be specified by regulatory texts.

Article 16 amends Article 36 of Act No 2021 1382 of 25 October 2021 on the regulation and protection of access to cultural works in the digital age, which specifies the scope and competence of the Centre of Expertise for Digital Regulation (PEReN). In particular, it aims to strengthen the PEReN's experimental and research powers, previously provided for and independently of the entry into force of Regulation 2022/2065.
The actors concerned are specified by the definition set out in Article 34 of the draft SREN Act: 'any natural or legal person offering, on a professional basis, whether for payment or not, a core platform service as defined in Article 2 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) or an online public communication service based on the processing of content, goods or services, using IT algorithms'. Pursuant to Article 36 of the Act of 25 October 2021, as amended by Article 16 of the draft SREN Act, the actors concerned may not refuse the PEReN access to the programming interfaces which they have developed and made accessible to third parties, nor impose limits on the extraction of publicly accessible databases, nor prohibitions provided for in the general conditions of use of the services making the data referred to available to the public. It should be stressed that these provisions do not impose any positive obligations on the actors concerned in relation to the exercise of their activity, but only prohibit them from obstructing the collection of data by the PEReN. Moreover, it is strictly necessary and proportionate to the purposes set.
The provisions of Article 16 are intended to apply, inter alia, to operators of information society services established in a Member State other than France. As detailed in the answer to questions 10 and 11, some of these operators may be requested in the context of an experiment conducted by the PEReN on behalf of another authority which has the powers to regulate them (whether this competence is assigned to it by the DSA or by other European or national legislation). Thus, if an experiment is intended to study the feasibility of a tool usable within the competence of the Competition Authority (application of the Commercial Code or Articles 101 and 102 TFEU), then it is not the country of establishment of the undertaking that determines that it is of interest to the supervisory authority but the place where the practices produce their effects. It is thus theoretically possible for the PEReN to study the feasibility of a digital tool to verify, for example, whether an algorithm leads to self-preferencing practices or improperly uses third-party data to its advantage. In such cases, tests may be conducted on companies established in a Member State other than France.

4. The Commission services would like to obtain more information on the concept of persons exercising the activity of commercial influence set out in Article 2b and, in particular:
a. whether that concept would also apply to influencers who fulfil the relevant criteria set out in Directive 2018/1808 ('the revised AVMS Directive') and who, as such, are considered to be on-demand media service providers within the meaning of that directive;
b. if so, whether the above-mentioned prohibition would also apply to influencers that are not established in French territory in accordance with Article 2 of the revised AVMS Directive;
c. what the practical implications of the prohibition laid down in Article 2b for 'online platforms' are;
d. whether this category of online platforms also includes video-sharing platform operators, as defined in Article 1(1)(aa) of the revised AVMS Directive;
e. whether this provision would apply to any type of online platform or only to online platforms whose principal purpose is to provide pornographic content.

The concept of "persons exercising the activity of commercial influence" referred to in Article 2b is defined in Article 1 of the Act of 9 June 2023 aimed at regulating commercial influence and combating the abuses of influencers on social networks.
Article 1 "Natural or legal persons who, for consideration, use their reputation among their audience to communicate to the public, by electronic means, content intended to promote, directly or indirectly, goods, services or any cause exercise the activity of commercial influence by electronic means."

The category of 'commercial influencer' may, where appropriate, include a provider falling within the qualification of on-demand audiovisual media service within the meaning of Directive 2018/1808. The provisions of Article 2b are intended to apply to 'persons exercising the activity of commercial influence' established in France or not.

Article 2b does not legally induce any action or obligation for 'online platforms' that host commercial influencers. The ban applies only to the commercial influencers themselves.

The concept of 'online platform' includes video-sharing platforms within the meaning of Article 1(1)(aa) of Directive 2018/1808.

The scope of 'online platforms' as referred to in Article 2b shall cover all persons who meet the criteria set out in Article 3(i) of Regulation (EU) 2022/2065.

5. As regards the scope and obligations arising from Article 3a A of the notified draft, the French authorities are invited to provide further explanations concerning:
a. services that fall within the scope and, in particular, whether the definition of hosting service providers also includes intermediary services as defined in Article 3(g) of Regulation (EU) 2022/2065 or video-sharing platform operators, as defined in Article 1(1)(aa) of the revised AVMS Directive;
b. if so, whether the above provision also applies to video-sharing platform operators that are not established on French territory in accordance with the competence criteria set out in Article 28a of the revised AVMS Directive, which refers to Article 3 of Directive 2000/31/EC;
c. what the concept of 'dissemination' implies;
d. what mechanisms are intended to enable hosting service providers to know when pornographic content has been disseminated without consent of the parties concerned.

The concept of 'hosting service providers' referred to in Article 3a A is defined in Article 22 of this draft Act by reference to the definition set out in Article 3(g)(iii) of Regulation (EU) 2022/2065. According to Article 3(g) of Regulation (EU) 2022/2065, a hosting service is an 'intermediary service' within the meaning of the DSA.

The category of 'hosting service providers' may also cover, where appropriate, 'video-sharing platform providers' within the meaning of Article 1(1)(aa) of Directive 2018/1808.
The provisions of Article 3a(A) are intended to apply to 'video-sharing platform providers' established in France or not.

The concept of 'dissemination' covers 'the making available of information to a potentially unlimited number of persons, meaning making the information easily accessible to recipients of the service in general without further action by the recipient of the service providing the information being required,' as clarified in recital 14 of Regulation 2022/2065.

Pursuant to Article 3a A, the hosting service provider is only obliged to respond to a withdrawal order issued by the competent administrative authority. It is not the responsibility of the hosting service to verify whether or not there is consent for the dissemination of the content at issue. This verification of whether or not there is consent for the dissemination of the content at issue falls within the tasks of the administrative authority defined in Article 6-1 of Act No 2004-575 of 21 June 2004 on trust in the digital economy. The administrative authority will base its analysis on any information or document submitted by the applicant. Article 6.1 provides for the supervision and monitoring of the regularity of such withdrawal requests by a qualified person.

In light of these factors, the French authorities remain sensitive to the concerns expressed by the Commission and are open to reconsidering the matter.

6. As regards the scope and obligations arising from Article 5a B of the notified draft, the French authorities are invited to provide further details concerning:
a. service providers that would fall within the scope of the mediation mechanism and, in particular, whether the definition of online social networking service providers referred to in Article 5a B of the notified draft also includes intermediary services as defined in Article 3(g) of Regulation (EU) 2022/2065 or video-sharing platform operators, as defined in Article 1(1)(aa) of the revised AVMS Directive;
b. if so, whether the mediation mechanism would also apply to video-sharing platform providers not established in the territory of France in accordance with the competence criteria set out in Article 28a of the revised AVMS Directive;
c. whether the concept of 'content which is not clearly unlawful' would cover audiovisual content within the meaning of the revised AVMS Directive, including the definitions of 'programme' and 'user-generated video' in Article 1(1)(b) and Article 1(1)(b) of the revised AVMS Directive respectively;
d. the meaning of 'content which is not clearly unlawful', and in particular whether it would cover categories of legal but harmful content, including those referred to in points (a) to (c) of Article 28b(1) of the Revised AVMS Directive (e.g. content likely to harm the physical, mental or moral development of minors or content inciting violence or hatred).

The concept of 'online social networking services' referred to in Article 5a B is defined in Article 22 of the draft Act (see subparagraph 32 of the October version of the text adopted by the National Assembly) through an amendment to Article 6.I of Act No. 2004-575 of 21 June 2004 on trust in the digital economy. Subparagraph 32 of Article 22 of the draft Act in its October version defines the category of 'social networking services' by reference to Article 2(7) of Regulation 2022/1925.

A social networking service falls within the definition of an 'intermediary service' within the meaning of Article 3(g) of Regulation (EU) 2022/2065.

The category of social networking services may also cover, where appropriate, certain 'video-sharing platform providers' within the meaning of Article 1(1)(aa) of Directive 2018/1808, but it covers a wider category. For these social networking services, which would also qualify as 'video-sharing platforms', Article 5a B is intended to apply to all those providers established or not established in France.

On this point, the French authorities take note of the Commission's observations on the criteria for the territorial competence of the Member States as provided for in Article 28a of Directive 2018/1808 AVMS Directive and are open to amendments in order to draw the consequences.

The concept of 'dissemination' covers 'the making available of information to a potentially unlimited number of persons, meaning making the information easily accessible to recipients of the service in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access

the information in question,' as clarified in recital 14 of Regulation 2022/2065.

The 'content' categories referred to in Article 5a B shall not be restricted: in this case, the mediation mechanism provided for in the article could also concern audiovisual content (a programme or user-generated video generated in the sense of the AVMS Directive).

The concept of 'content which is not clearly unlawful' must be understood as any content that the online communication service deems impossible to classify as unlawful on the basis of the information available to it when processing the alert issued by the user. The user, having received a negative response to a removal request following his/her report, can then benefit free of charge from the use of a mediator for an amicable resolution with the person responsible for the reported content. The purpose of this mediation tool is to help users with content that is too complex to be legally classified by the online service and therefore cannot be removed in an automatic manner. The purpose of this system is to replace the more cumbersome and longer litigation procedure. Among this content 'which is not clearly unlawful', it is conceivable that content of a purely harmful nature (such as the content referred to in Article 28b(1) (and in particular video content detrimental to the development of minors) may also be the subject of the mediation provided for in Article 5a B.

In light of these factors, the French authorities are sensitive to the concerns expressed by the Commission and are open to reconsidering the matter.

7. The French authorities are invited to clarify the envisaged interaction between the mediation mechanism provided for in Article 5a B of the notified draft and the out-of-court redress mechanisms provided for in Article 28b(6) of the revised AVMS Directive and the out-of-court dispute resolution bodies set out in Article 21 of Regulation (EU) 2022/2065. In particular, the Commission services would like to know whether the mediation system can be considered as an out-of-court redress mechanism within the meaning of Article 28b(6) and thus represents a transposition of the revised AVMS Directive – or whether it would operate in parallel with other out-of-court redress mechanisms transposing Article 28b(6) of the revised AVMS Directive.

The means provided for in Article 5a B is a mediation mechanism for resolving a dispute between users.
The out-of-court dispute resolution arrangements provided for in Article 28b(7) of Directive 2018/1808 concern disputes between a user and a 'video-sharing platform provider' and not disputes between users. The same applies to the alternative dispute resolution arrangements provided for in Article 21 of Regulation 2022/2065.
The mediation mechanism provided for in Article 5a B is therefore independent of both the out-of-court dispute resolution arrangements provided for in Directive 2018/1808 and those provided for in Regulation 2022/2065.

8. The Commission services would also like clarification as to whether users using the mediation system provided for in Article 5a B of the notified draft would still be able to avail themselves of the legal protection afforded by national law, including by asserting their rights before a court or tribunal.

Users who use the dispute mediation mechanism defined in Article 5bis(B) may appeal to the courts at any time. Under no circumstances shall this mechanism deprive the user of the legal protection conferred by national law.

9. The Commission services invite the French authorities to provide more information on the concept of monetisable digital object gaming companies referred to in Articles 15 and 15a; and whether it could include intermediary service providers as defined in Article 3(g) of Regulation (EU) 2022/2065.

Monetisable digital object gaming companies are defined as companies offering games to people on French territory:
- Transmitted via an online communication service;
- For a fee. There must be a financial cost for the player to participate in the game: a subscription, purchase of the game, wagers, an entry fee, purchase of an object in the game (e.g.: sword, card, NFT, skins), etc. ;
- Makes it possible to obtain monetisable digital objects by a random mechanism. These items can only be elements of the game that confer rights in the game and can be transferred for consideration to third parties. However, the player

may not transfer these objects to the gaming company that issued them or to a company acting in concert with it.
As part of the game, players will be able to obtain rewards, the list of which will be set out in a regulatory text. Winnings in legal tender currency are excluded.
The categories of games (e.g. fighting games, strategy games, fantasy sports games, etc.) authorised will also be set by regulation. These games will be able to use both web2 and web3 technology.
Online services that offer online games with monetisable digital objects are publishers of online services falling within the category of 'information society services' within the meaning of Directive 2015/1535, but they do not fall within the category of 'intermediary services' within the meaning of Article 3(g) of Regulation (EU) 2022/2065.

10. The Commission services would like to receive further information on the objectives pursued by the notified draft, and in particular Articles 2b, 3a A, 5a B, 5d and 16, and to what extent the obligations set out therein are necessary to achieve those objectives, taking into account the maximum harmonisation rules and obligations set out in Regulation (EU) 2022/2065.

The objectives pursued by the notified provisions (Articles 2b, 3a A, 5a B, 5d and 16 in particular) and their necessity in view of the importance of the issues at issue (combating the dissemination of pornographic content, the mediation tool for disputes between users, information to parents and guardians about cyberbullying and the power to collect data from an administrative service) are explained in point 3 above. In view of their scope set out above, it does not appear to the French authorities that they give rise to contradictory difficulties in the light of the principle of maximum harmonisation of Regulation 2022/2065 as put forward by the Commission.

However, as stated above, the French authorities are sensitive to the concerns expressed by the Commission, particularly on Articles 2b, 3a A, 5a B and 5d and are open, in a spirit of good cooperation, to reconsider these matters.

11. The Commission services would like to receive additional information in order to better understand the scope of Article 16 of the notified draft and the possible obligations for providers of intermediary services as defined in Article 3(g) of Regulation (EU) 2022/2065. The Commission services would like to receive more information on the intended interaction of this provision with Articles 40 and 56 of that Regulation.

As a reminder, the Centre of Expertise for Digital Regulation (PEReN) is a service with national competence, under the authority of several ministers, which provides technical expertise in the field of platform regulation to many administrations. It was created by Decree No 2020-1102 of 31 August 2020 establishing a service with national competence called the 'Centre of Expertise for Digital Regulation'.
The PEReN is not a regulator; it provides technical tools and expertise to all French administrations that have powers to regulate digital platforms, regardless of the scope of these competences:
 the GDPR with the CNIL;
 the DSA with the ARCOM;
 Competition law with the ADLC;
 DMA with the ADLC and DGCCRF;
 Rights and freedoms enshrined in the French Constitution with the Defender of Rights;
 Police measures with the Ministry for the Interior
 etc.
In each of these fields, the PEReN has no legal competence and does not implement any obligation, but provides digital tools that can be mobilised by the public authorities that have such competence.
Article 16 of the draft SREN Act amends Article 36 of Act No 2021 1382 of 25 October 2021 on the regulation and protection of access to cultural works in the digital age, which specifies the scope and competence of the PEReN. In particular, Article 16 of the draft SREN Act aims to strengthen the PEReN's experimental and research powers, previously provided for and independently of the entry into force of Regulation 2022/2065.
The PEReN's power of experimentation is intended to enable it to design tools and test their technical feasibility before they are entrusted to the administrations responsible for their implementation.
In order not to interfere with the powers of regulators and to protect platforms and their users, any data collected and

processed by the PEReN in the context of experiments shall be destroyed at the end of the experiment and may not be used in any procedure. The experiment is used to design a tool, which is then transmitted to the authority in charge of a control task, which will be able to use it within its own legal framework and with the related procedural safeguards.
Operators covered by DSA obligations may also be subject to requests for experimentation, just as other platforms could be, whether it is a field corresponding to the DSA or not. For example, the CNIL may need to design tools for quantitative analysis of dark patterns related to obtaining consent on cookies. The DGCCRF can seek to verify that platforms comply with the transparency obligations under the Platform to Business Regulation, and that an algorithm audit tool confirms that the platform has declared the variables its algorithms use.
Platforms subject to a notification of experimentation cannot object to the PEReN collecting the data that they make publicly available, but as stated, the experiment is a 'mock-up exercise' which aims to validate the feasibility and reliability of a tool, but no data collected is retained after the experiment and no legal consequences can be drawn from it.
Apart from this experimentation activity, the PEReN has a research activity, within the meaning of Article L. 112-1 of the Research Code, which is provided for by law and which entrusts it with the task to publish its advances in digital expertise for the regulation of platforms. In this respect, the PEReN is registered in the National Directory of Research Structures maintained by the Ministry of Higher Education for Research and Innovation. It welcomes doctoral students and trainees within its research projects, produces scientific publications and participates at academic conferences.
This activity leads it to collaborate with the academic community and in this context to use the tools provided by the platforms for this type of work. However, the reputation and size of the PEReN do not make it easily identifiable by the services of digital platforms that authorise access to researchers and are often located across the Atlantic.
It thus appeared necessary in this context to have a legislative provision reaffirming the PEReN's research mission which could serve to facilitate the recognition of this activity by foreign actors, researchers or platforms. For the avoidance of doubt, a reference to the access provided for researchers by the DSA in its Article 40 has been specifically mentioned, without this meaning that the PEReN's research activity is limited to the scope of the DSA. In particular, work in the field of data anonymisation and in the field of artificial intelligence is underway and the draft SREN Act thus plans to strengthen the PEReN's activity in this field.
Article 16 of the draft SREN Act is not strictly an article adapting Regulation 2022/2065, and both the experimental power and the research missions have been designed as cross-cutting many regulations while not encroaching on the competence of the authorities responsible for their implementation, be it the DSA, the GDPR or the many pre-existing provisions on the matter.
12. To the extent that the French authorities reply in the affirmative to questions 5a, 6a and 9, the Commission services would like to receive further information on the monitoring of compliance and application of the draft Act, in particular with regard to Chapter IV of Regulation (EU) 2022/2065.

Chapter IV of Regulation 2022/2065 deals with the supervision of compliance with certain obligations imposed on 'intermediary service providers', in particular hosting service providers and online platform services.
This chapter provides that the authority of the country of establishment is responsible for supervising medium-sized intermediary services and that the European Commission has exclusive supervisory competence in relation to very large online platforms.

Article 3a(A), which is addressed to publishers of online services as well as to hosts, thus covers a broader category that goes beyond that of 'intermediary services' within the scope of Regulation 2022/2065. Article 5a B concerns social networking services, which fall within the scope of 'intermediary services' within the meaning of that regulation.

The main contribution of Article 3a A consists of a mechanism of administrative notices: however, as a reminder, recital 31 of Regulation 2022/2065 states that the system of judicial or administrative orders falls within the legal system of each Member State and that the competent national authorities may, without prejudice to Regulation 2022/2065, issue measures against providers of intermediary services.

The main contribution of Article 5a B concerns the creation of a tool for mediation between users, which remains subject to the conclusion of an agreement between associations and the social network. The French authorities are sensitive to the Commission's remarks regarding the mandatory nature of acceding to agreements with associations by actors with

an audience larger than a certain threshold, and are open to reconsidering this point.

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